

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

FILED
01/03/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
39E-0155-P-2022
Stern, Anika
4.00

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
BOX ELDER CREEK BASIN (39E)
PRELIMINARY DECREE

CLAIMANT: Gardner Home Place LLC

CASE 39E-0155-P-2022
39E 27586-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above-stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

FINDINGS OF FACT

1. Gardner Home Place LLC is the record owner of claim 39E 27586-00.
2. Claim 39E 27586-00 was decreed with DNRC issue remarks:

POINT OF DIVERSION AND MEANS OF DIVERSION WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

THIS CLAIM APPEARS TO BE CLAIMING SEPARATE SOURCES OF WATER. MORE THAN ONE WATER RIGHT MAY BE INVOLVED.

The first issue remark is a notice-type issue remark and does not require further attention. Claimant Gardner Home Place LLC was ordered to meet with the DNRC to address the source issue remark.

3. On November 4, 2022, DNRC Water Resource Specialist Brandy Gray filed a Memorandum stating she was initially contacted by Doug Gardner on behalf of the Claimant, but Doug Gardner did not respond to her return call. Ms. Gray reviewed the claim file, the 1960 Water Resource Survey, aerial photos, and the USGS Streamstats website to prepare her memorandum. Ms. Gray indicated that because claim 39E 27586-00 describes two sources (Soda Creek and an Unnamed Tributary of Soda Creek) an implied claim needs to be created, Ms. Gray's Memorandum recommends the creation of an implied claim.

4. The fact that Soda Creek and an Unnamed Tributary of Soda Creek are identified on the claim does not require the generation of an implied claim. According to the DNRC Claims Examination Manual:

- For claims involving a named source and an unnamed tributary to that same source, **and** there is no apparent adverse effect to other water users, the claim will be reviewed as one water right. The database will accommodate the named source and the unnamed tributary. The named source and the unnamed tributary should be entered as the source for the appropriate POD.

See Claims Examination Manual, VI, D.9.b. In the present situation, rather than implying a claim from claim 39E 27586-00, it appears more obvious to recognize *both sources* on claim 39E 27586-00, resolving the issue remark.

5. An Order was issued setting a December 16, 2022 deadline for Claimant Gardner Home Place LLC to agree or disagree that the source for point of diversion no. 1 be identified as "Soda Creek" and the source for points of diversion nos. 2 through 6 be identified as "Unnamed Tributary of Soda Creek." The Order stated that if nothing were filed by the deadline, this Master would conclude Gardner Home Place LLC agrees with the proposed changes. The following language was included in the Order:

Failure to comply with the terms of this Order may result in sanctions, up to and including entry of default and termination of a water right claim or dismissal of objections. Rule 22, W.R.Adj.R.

Nothing was filed by the deadline.

PRINCIPLES AND CONCLUSIONS OF LAW

1. The Water Court must address all issue remarks that appear on a claim as well as any objections the claim receives. Sections 85-2-233, 85-2-247, and 85-2-248, MCA.

2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564. The existence of an issue remark does not overcome the prima facie statement of claim.

3. Pursuant to Rule 22, W.R.Adj.R., if a claimant, objector, or intervenor fails to appear at a scheduled conference or hearing, or fails to comply with an order issued by the Water Court, the Water Court may issue such orders of sanction with regard thereto as are just.

4. The point of diversion and means of diversion issue remark decreed on claim 39E 27586-00 is a notice-type issue remark. As no objections were filed, no further proceedings are required.

RECOMMENDATIONS

1. Claim 39E 27586-00 should be modified as follows:

Source Name: SODA CREEK

Source Type: SURFACE WATER

Source Name: UNNAMED TRIBUTARY SODA CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	SODA CREEK	SWNESE	9	6S	56E	CARTER
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						
2	UNNAMED TRIBUTARY SODA CREEK	NENWNW	9	6S	56E	CARTER
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						
3	UNNAMED TRIBUTARY SODA CREEK	NWSWNE	9	6S	56E	CARTER
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						
4	UNNAMED TRIBUTARY SODA CREEK	SENESE	9	6S	56E	CARTER
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						
5	UNNAMED TRIBUTARY SODA CREEK	SENESE	9	6S	56E	CARTER
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						
6	UNNAMED TRIBUTARY SODA CREEK	SWNWNW	10	6S	56E	CARTER
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						

2. The issue remarks should be removed from claim 39E 27586-00.

A Post Decree Abstract of Water Right Claim is served with the Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Gardner Home Place LLC
2770 Hammond Rd.
Hammond, MT 59332

\\judgah2osrv\Datavol\Share\WC-BASIN FOLDERS\39E PD\Cases\155\39e-0155-P-2022 MR 12.23.22 rc.docx

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOXELDER CREEK
BASIN 39E**

Water Right Number: 39E 27586-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: GARDNER HOME PLACE LLC
2770 HAMMOND RD
HAMMOND, MT 59332

Priority Date: SEPTEMBER 30, 1942

Type of Historical Right: FILED

Purpose (use): IRRIGATION
Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 150.00 AC-FT
Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 97.00

Source Name: SODA CREEK
Source Type: SURFACE WATER

Source Name: UNNAMED TRIBUTARY OF SODA CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNESE	9	6S	56E	CARTER
Source Name: SODA CREEK						
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						
2		NENWNW	9	6S	56E	CARTER
Source Name: UNNAMED TRIBUTARY OF SODA CREEK						
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						
3		NWSWNE	9	6S	56E	CARTER
Source Name: UNNAMED TRIBUTARY OF SODA CREEK						
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						
4		SENESE	9	6S	56E	CARTER
Source Name: UNNAMED TRIBUTARY OF SODA CREEK						
Period of Diversion: FEBRUARY 15 TO NOVEMBER 15						
Diversion Means: DIKE						

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	88.00		N2	9	6S	56E	CARTER
2	9.00		NWNW	10	6S	56E	CARTER
Total:	97.00						